

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
JULY 16, 2008 Session

**DENISE R. CARDELLA v. VINCENT R. CARDELLA, JR.**

**Direct Appeal from the Circuit Court for Rutherford County  
No. 53229 J. Mark Rogers, Judge**

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**No. M2007-01522-COA-R3-CV - Filed September 17, 2008**

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This is a divorce and tort action. Wife filed a complaint for divorce against husband, alleging, as grounds, inappropriate marital conduct, adultery, and irreconcilable differences. Husband counter-claimed for an absolute divorce. In her amended complaint, Wife also claimed that Husband had negligently infected her with a sexually transmitted disease, and sought monetary damages. A full trial on the merits was held. The trial court awarded the divorce to Wife on the stipulated ground of adultery, approved the stipulated division of personal property and debts, named wife as primary residential parent, set shared parenting time, and awarded attorney fees and costs. In addition, the trial court granted alimony *in solido* and alimony *in futuro* to Wife and awarded her damages in the amount of \$288,000.00 for the negligence claim. Husband appeals, asserting that the trial court erred in finding him liable for negligently transmitting a sexually transmitted disease to the wife and in awarding \$288,000.00 to wife for the negligence. Husband also appeals the propriety of the trial court's awards of alimony *in solido* and alimony *in futuro*. We reverse the trial court's award of alimony *in futuro*. We affirm the trial court on all other issues.

**Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed in Part and Affirmed in Part**

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and WALTER C. KURTZ, SR. J., joined.

Stephen W. Pate, Murfreesboro, TN, for Appellee

Phillip M. George, Smyrna, TN for Appellant

**OPINION**

**Facts and Procedural History**

This is a divorce and tort action. Denise Cardella (hereinafter, "Wife") and Vincent R. Cardella, Jr. (hereinafter, "Husband") married on November 5, 2001. The parties have one minor

child, born May 23, 2002. After the parties were married, they resided in Florida, but later moved to Rutherford County, Tennessee for Husband's job. In January of 2006, Wife testified that she noticed a blister on Husband's penis, and when she inquired about it, he responded that it was flaky skin. In early 2006, Wife became aware that Husband was engaging in an extramarital affair. In March of 2006, Wife began experiencing symptoms consistent with what she believed to be a sexually transmitted disease (hereinafter, "STD"). Wife sought medical treatment from her personal physician, Dr. Heather D. Rupe (hereinafter, "Dr. Rupe"), who tested Wife for several STDs, but did not test Wife for the herpes virus. Wife's STD test results were negative.

On March 1, 2006, Wife filed a Complaint for Divorce alleging irreconcilable differences, inappropriate marital conduct, and adultery. Husband filed an Answer and Counter-Complaint on March 20, 2006, denying inappropriate marital conduct and adultery, but agreeing that irreconcilable differences existed. Husband also alleged, that Wife had engaged in inappropriate marital conduct. In August of 2006, symptoms similar to the symptoms Wife experienced in March of 2006 recurred. Wife returned to Dr. Rupe and this time, was tested for herpes. The test results revealed that Wife had herpes virus simplex II, an incurable sexually transmitted disease. On September 11, 2006, Wife moved for leave to file an amendment to her Complaint. Her motion was granted, and on October 9, 2008, Wife amended her Complaint, alleging that she contracted herpes simplex II virus from Husband, as the result of his engaging in sexual intercourse and/or relations with other women during the parties' marriage. Wife prayed for compensatory damages for current and future medical expenses, personal injury, pain, suffering, and loss of enjoyment of life. On October 12, 2006, Husband filed a Response to the Amendment to Complaint for Divorce, denying all allegations. On April 3<sup>rd</sup>, 10<sup>th</sup>, and 12<sup>th</sup>, 2006, the trial court heard this case.

The trial court awarded the divorce to the Wife on the stipulated ground of adultery, approved the stipulated division of personal property and debts, named the wife primary residential parent, set parenting time for the husband, and allocated attorney fees and costs. In addition, the trial court awarded alimony *in solido* and alimony *in futuro* to the Wife and damages in the amount of \$288,000.00 for her negligence claim. Husband appeals.

### **Issues**

On appeal, Husband raises four (4) issues:

1. Whether the trial court erred in finding Husband negligent by allegedly infecting Wife with a sexually transmitted disease.
2. Whether the trial court erred in awarding damages to Wife in the amount of \$288,000.00 for the tort claim.
3. Whether the trial court erred in awarding alimony to Wife.
4. Whether the trial court erred in awarding alimony *in futuro* as a means of circumventing Husband's potential bankruptcy of the tort award.

### **Standard of Review**

The trial court's findings of fact are reviewed “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d). Our consideration of the preponderance of the evidence “is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal.” *Rice v. Rice*, 983 S.W.2d 680, 682 (Tenn. Ct. App. 1998). Review of a question of law is also de novo, but ““with no presumption of correctness afforded to the conclusions of the court below.”” *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001)).

The Husband asserts that the trial court erred in finding that he negligently infected the Wife with herpes simplex II virus. For the reasons set forth herein, we find that the trial court did not err and affirm its decision.

Although this is an unusual issue, it is not an issue of first impression. The question of whether Tennessee recognizes a claim for negligent transmission of a venereal disease was answered in the affirmative by this Court in *Hamblen v. Davidson*, 50 S.W.3d 433 (Tenn. Ct. App. 2000). In *Hamblen*, the plaintiff sued her ex-husband, and alleged that he had negligently infected her with the virus that causes genital herpes. *Id.* at 438. The trial court granted the ex-husband’s motion for summary judgment, finding that the one-year statute of limitation barred the plaintiff’s claim, that the plaintiff failed to establish that her ex-husband knew or should have known that he had herpes, and that the plaintiff failed to establish that she contracted the virus from her ex-husband. *Id.* at 434-35. This Court reversed, holding that each of the issues were issues for the jury decide. *Id.* at 438, 439 - 41.

As with any negligence claim, a plaintiff alleging damages from negligent transmission of a disease must establish the traditional elements of a negligence claim. Those elements are: (1) the existence of a legal duty; (2) breach of that legal duty; (3) an injury to the plaintiff; (4) causation in fact; and (5) proximate or legal causation. *Id.* at 438 (citing *Roe v. Catholic Diocese of Memphis, Inc.*, 950 S.W.2d 27, 31 (Tenn. Ct. App. 1996)). Whether a legal duty exists in any negligence action is a question of law for the court to decide. See *Blair v. Campbell*, 924 S.W.2d 75, 78 (Tenn. 1996).

The trial court, specifically found the Wife’s testimony to be credible in all aspects. The trial court found Husband’s testimony to be credible regarding how much he loved his child, but did not find him to be credible when testifying about his sexual activities. The record reveals numerous inconsistencies in the Husband’s testimony when compared to his answers to Wife’s interrogatories and his deposition. When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who observed the witnesses and their demeanor while testifying is in a far better position than this Court to decide those issues. See *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *Id.*; see also *Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997).

The Husband admitted to having at least one extramarital affair while married to the Wife, and recalled engaging in fellatio and at least two instances of sexual intercourse during that affair. The Husband testified that the affair began in February of 2006. The Wife testified that she and the Husband had sexual intercourse on February 14, 2006, but Husband denied having sex with the Wife for two (2) years prior to the trial. Both the Husband and his paramour testified that the Husband wore a condom during intercourse. The Wife presented evidence that strongly suggested that the Husband had been unfaithful on other occasions with other women since the beginning of their marriage. The Wife also presented evidence that, in January 2006, she noticed a lesion on the Husband's penis. At that time, the Wife did not know that the Husband had engaged or was engaging in an adulterous affair. The Wife testified that she asked the Husband about the lesion, and that he told her that it was nothing more than dry skin. Husband conceded that he does, in fact, have the herpes simplex II virus, but asserts that he did not know he had the virus until January of 2007. The trial court found that the Husband's knowledge of his own infidelity and Wife's questioning him about the lesion on his penis put him on notice that he may have some form of sexually transmitted disease or condition. Further, the trial court found that, during Husband's infidelity, he continued to engage in sexual intercourse with Wife, placing Wife in a position of risk.

The threshold question for us is whether a duty exists. "If a reasonable person would not have foreseen the harm, then there is no duty of care, regardless of whether the defendant's act caused harm to the plaintiff." *Hamblen*, 50 S.W.3d at 439 (citing *Eaton v. McLain*, 891 S.W.2d 587, 594 (Tenn. 1994)). 'The pertinent question is whether there was any showing from which it can be said that the defendant reasonably *knew or should have known* of the probability of an occurrence such as the one which caused plaintiff's injuries.' *Id.* (citing *Doe v. Linder Constr. Co.*, 845 S.W.2d 173 (Tenn. 1992)). In Tennessee, a person who "knows or should know he has a venereal disease has a legal duty to use reasonable care in preventing the disease's transmission." *Id.* at 438. (citations omitted). Other jurisdictions have found that "an individual has a duty to refrain from sexual contact or warn of his symptoms if he knows or suspects that he has symptoms 'suggesting any kind of venereal disease.'" *Id.* at 439 (citing *Meany v. Meany*, 639 So.2d 229, 236 (La. 1994)). Based on the record and the trial court's credibility findings, we find that the trial court properly determined that the Husband owed a duty to the Wife, and that the Husband knew or should have known that he was placing his wife at risk for STDs by his conduct.

Although it is not disputed that the Wife is infected with the herpes simplex II virus, it is disputed whether the Husband is the cause of the infection. Causation, or cause in fact, concerns the relationship between the defendant's conduct and the plaintiff's injuries. See *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). Proximate cause has been explained as "the nexus between the negligence and the injury." *Stricklan v. Koella*, 546 S.W.2d 810, 813 (Tenn. Ct. App. 1976).

In this case, the trial court served as the ultimate fact-finder. The trial court found that the Husband's involvement in an extra marital affair while continuing to have sexual relations with his Wife was the cause in fact of the Wife contracting the herpes simplex II virus. The Wife contends

that her infection is a direct result of Husband's engaging in extramarital sexual relations. Husband argues that Wife failed to establish that he was the source of her herpes. Husband contends, and Wife admits, that she was previously married in 1999 to another man who cheated on her, and that she was sexually active with two other men prior to her first marriage. The Wife testified that she was not sexually active with any other men while she was married to the Husband and has not been sexually active since they separated. The Husband asserts that one of the men from her past sexual experiences could be the cause of her herpes. To support his position, the Husband points to the deposition testimony of his treating doctor, Dr. Matthew Perkins. Dr. Perkins testified that it was possible for the Wife to have contracted the disease from one of her past sexual partners and that the disease could lie dormant for years. Wife disputes this contention, and points to Dr. Rupe's testimony. Dr. Rupe testified that while it is *possible* for the disease to lie dormant with no signs or symptoms for many years, and then suddenly create symptoms that frequently reappear, it was *improbable* that this would occur.

The causation issue is one for the jury to determine, and "this Court has noted that a jury may infer a causal connection through the use of circumstantial evidence, expert testimony or both." ***Hamblen***, 50 S.W.3d at 440. Our Supreme Court has defined an inference as "a permissible deduction from evidence which a jury may accept or reject or accord such probative value as it desires." ***Benton v. Snyder***, 825 S.W.2d 409, 414 (Tenn. 1992).

The trial court determined that Husband's extramarital activity was the cause in fact of the Wife contracting the disease. We agree, finding that the expert testimony and all the facts presented at trial support this causal connection. Accordingly, we find that the trial court did not err in determining that Husband negligently transmitted a STD to Wife.

Next, we address whether the trial court erred in awarding the wife damages in the amount of \$288,000 for her tort claim. In ***Waggoner Motors, Inc. V. Waverly Church of Christ***, this Court discussed compensatory damages:

The purpose of compensatory damages is to compensate a party for the loss or injury caused by a wrongdoer's conduct. The goal is to restore the injured party, as nearly as possible, to the position the party would have been in had the wrongful conduct not occurred. The injured party should be fully compensated for all losses caused by the wrongdoer's conduct.

The party seeking damages has the burden of proving them. While there is no mathematical formula for calculating damages in negligence cases, the proof of damages must be as certain as the nature of the case permits and must enable the trier of fact to make a fair and reasonable assessment of the claimed damages.

*Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 57 -58 (Tenn. Ct. App. 2004) (citations omitted).

“Whether the trial court has utilized the proper measure of damages is a question of law that we review *de novo*.” *Memphis Light, Gas & Water Div. v. Starkey*, 244 S.W.3d 344, 352 (Tenn. Ct. App. 2007) (quoting *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn. Ct. App. 1998); *see also Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005). The amount of damages awarded, however, is a question of fact so long as the amount awarded is within the limits set by the law. *Id.* Thus, in a non-jury case such as this, we review the amount of damages awarded by the trial court with a presumption of correctness, unless the preponderance of the evidence demonstrates otherwise. *See* Tenn. R. App. P. 13(d).

Wife presented evidence through Dr. Rupe that the herpes virus simplex II virus is a chronic and permanent condition. Medication can suppress the symptoms, but will not cure the virus. Symptoms of the virus that the Wife has personally experienced include back pain, pain in her legs, blisters on her buttocks, and vaginal discharge. Other symptoms Wife may experience in the future are blisters on her genitals and searing pain. Wife is able to manage her symptoms with medication, but if she stops taking the medicine, her symptoms recur. Additionally, when Wife is experiencing symptoms, she is unable to sit for an entire day without experiencing significant discomfort, and has difficulty engaging in water activities, normal housekeeping activities, and walking, jogging, or tennis. This incurable disease can be transmitted to other sexual partners. The virus can also present a serious danger for the wife if she desires to have other children.

Wife is 30 years old and has a life expectancy of 77 years. To manage the virus, Wife takes Valtrex. She will need to visit her gynecologist for treatment every six months until the disease is under control and then annually thereafter. Wife testified that she currently has insurance which allows her to pay \$15.00 per prescription or office visit. The current cost of Valtrex without insurance ranges from \$191.99 to \$254.99 depending on the dosage. The cost of an annual medical visit with Dr. Rupe is \$160.00 and the cost for a six month visit is \$55.00 . Wife testified that the lifetime costs of her medication, without factoring inflation, is \$217,152.00. Considering the prescription costs, medical care costs, and Wife’s pain, suffering, and loss of enjoyment of life, we find that the evidence supports the trial court’s award of compensatory damages, and affirm the award.

We next address whether the trial court erred in granting Wife alimony. Wife asked for two (2) years of rehabilitative alimony at \$1000.00 per month. The trial court found that the Wife demonstrated a need for spousal support and that the Husband had the ability to provide the support. Rather than requiring the Husband to pay monthly support for two (2) years, the trial court awarded the Wife \$24,067.13 as alimony *in solido* from the Husband. The funds were derived from the

Husband's interest in the proceeds from the sale of the parties home, \$4067.13, and the Husband's interest in undeveloped real estate valued at \$20,000.00.

T.C.A. § 36-5-121(h)(3)(i) delineates the factors to be considered by the trial court in awarding alimony.<sup>1</sup> Of these factors, need and the ability to pay are the critical factors to be

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<sup>1</sup>T.C.A. § 36-5-121(h)(3)(i) provides:

(I) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:

(1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

(2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;

(3) The duration of the marriage;

(4) The age and mental condition of each party;

(5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

(7) The separate assets of each party, both real and personal, tangible and intangible;

(8) The provisions made with regard to the marital property, as defined in § 36-4-121;

(9) The standard of living of the parties established during the marriage;

(10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and

(continued...)

considered. *Loyd v. Loyd*, 860 S.W.2d 409 (Tenn. Ct. App. 1993). These factors apply whether the court is making an award of alimony *in futuro* or alimony *in solido*. *Houghland v. Houghland*, 844 S.W.2d 619, 621 (Tenn. Ct. App. 1992) (citing *Fisher v. Fisher*, 648 S.W.2d 244, 246-47 (Tenn. 1983)). An award of alimony is within the sound discretion of the trial court. *Rains v. Rains*, 428 S.W.2d 650 (Tenn. Ct. App. 1968).

Husband argues that Wife did not seek alimony in her original Complaint or her amended Complaint. Wife concedes this point. Wife maintains, though, that her inclusion of “Payment of Alimony” in her pretrial statement required by the local rules of court provided sufficient notice for Husband to defend against the issue at trial. The parties exchanged their pretrial documents three (3) days prior to trial, and Wife’s statement was included in that exchange. Husband contends since Wife did not request alimony in her Complaint or her amended Complaint, he assumed that it would not be an issue at trial.

Both rule 15.02<sup>2</sup> and 54.03<sup>3</sup> of the Tennessee Rules of Civil Procedure permit relief beyond

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<sup>1</sup>(...continued)

tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and

(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

<sup>2</sup>Tenn. R. Civ. P. 15.02 Provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Provided, however, amendment after verdict so as to increase the amount sued for in the action shall not be permitted. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

<sup>3</sup>Tenn. R. Civ. P. 54.03 provides:

(continued...)



the pleading, if the issue is litigated and the opposing party has the opportunity to defend. This Court has consistently held that as a matter of justice a deserving spouse must be provided support if that issue, though not pleaded, was litigated upon adequate notice. See *Bulla v. Bulla*, No. 01A-01-9004-CV-00133, 1990 WL 160291, at \*3-4 (Tenn. Ct. App. Oct. 24, 1990); *Moore v. Moore*, No. 87-92-II, 1988 WL 63498, at \*2 (June 24, 1988).

While it would have been more prudent for Wife to inform Husband of her intent to request alimony prior to the exchange of pretrial financial statements, we believe that Husband had adequate notice that alimony would be an issue at trial. Wife requested pendente lite support and prayed for general relief at the inception of the suit. Additionally, Husband did not ask to continue the trial to prepare more adequately to litigate the alimony issue. It cannot be argued that Husband was not afforded an opportunity to defend. At the beginning of the trial, Husband's counsel was afforded the opportunity to object on the basis of notice, but neglected to do so. Instead, Husband's counsel merely told the trial court that he objected to paying alimony. He did not address the notice issue until after the proof was closed.

The Wife presented her expenses to be \$4,186.32 per month. She currently earns \$2,734.00 gross per month, and Husband earns \$3,293.00 per month, per their W-2 forms for 2006. The Wife's need can be satisfied by the trial court's apportionment of the property and the award of funds held in trust. We are unable to find that the evidence preponderates against the trial court's award.

Finally, we address whether the trial court erred in awarding alimony *in futuro* of \$1.00 per month as a means of circumventing the Husband's potential bankruptcy of the tort award. In its Order Modifying Final Decree of Divorce, the trial court stated:

Mrs. Cardella was living without any health insurance, except what she can purchase on her own - and I will address this in a moment, but I'm going to also award her alimony in futuro at the rate of \$1 per month. . . And that will be paid for the remainder of her life, subject to modification if the need should arise. . . [I]t's a judgment. That also ties in with why I've awarded Mrs. Cardella \$1 a month alimony for the rest of her life in futuro, because I don't know what's going to happen with her ability to get her insurance, et cetera. I find she has a need. I find Mr. Cardella has the ability to pay. As you know,

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<sup>3</sup>(...continued)

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings; but the court shall not give the successful party relief, though such party may be entitled to it, where the propriety of such relief was not litigated and the opposing party had no opportunity to assert defenses to such relief.

Counsel, that should the bankruptcy take care of the \$288,000, that there's always the right to come back and affect the modification of alimony in futuro.

Husband argues that the \$288,000.00 was not intended as a support award, but rather as a tort award. He contends that it was improper for the trial court to create a "back door" to reach Husband, should the \$288,000.00 judgment be bankrupted. Husband cites *Long v. Calhoun*, 715 F.2d 1103 (6<sup>th</sup> Cir. 1983) in support of his argument. Wife contends that the trial court intended the award to provide necessary support to Wife, and should Husband bankrupt the judgment, she would be financially disadvantaged. In that situation, Wife argues, she would need additional support and the trial court's grant of alimony *in futuro* would allow her to ask for a support modification at that time.

In Tennessee, our courts "recognize[] several separate classes of spousal support, including long-term spousal support (alimony *in futuro*), alimony *in solido*, rehabilitative spousal support, and transitional spousal support." *Riggs v. Riggs*, 250 S.W.3d 453, 456 (Tenn. Ct. App. 2007) (footnotes omitted). T.C.A. § 36-5-121(d)(2) reflects a statutory preference favoring rehabilitative spousal support and transitional spousal support over long-term spousal support. *Id.* (citations omitted). However, this statutory preference does not entirely displace the other forms of spousal support when the facts of the case warrant long-term or more open-ended support. *Id.* (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn.1995)).

Alimony *in futuro* is defined as:

[A] payment of support and maintenance on a long term basis or until death or remarriage of the recipient. Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

T.C.A. § 36-5-121(f)(1).

If Wife can show a substantial or material change in circumstances, her alimony *in futuro* award may be increased, decreased, terminated, extended or otherwise modified. *See* T.C.A. § 36-5-121(f)(2)(A). The relevant question is whether the award of \$288,000.00 directly affects the support needed. Our review of the record reveals that the trial court took Wife's future healthcare expenses seriously, and determined that she had a need for assistance in managing those costs. The trial judge was faced with the task of determining the needs of Wife and the Husband's ability to pay support. Husband cites the *Long* case for support, but it seems Husband's argument regarding the

\$288,000.00 award is better suited for the bankruptcy court. In *Long*, the Sixth Circuit addressed whether the assumption of joint debts was to be treated as a form of spousal support or could be discharged under 11 U.S.C. § 523(a). *Long*, 715 F.2d at 1105

We do not have the jurisdiction to determine whether the \$288,000.00 award is dischargeable under 11 U.S.C. § 523. See *id.* at 1107 (citing S. Rep. No. 95-989, 95th Cong., 2d Sess., 79, reprinted in [1978] U.S. Code Cong. & Ad. News 5787, 5865. See also H.R. No. 95-595, 95th Cong., 1st Sess., 364 (1977), reprinted in [1978] U.S. Code Cong. & Ad. News 5963, 6320) (stating that “[w]hat constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law”) (emphasis in original)). Such findings are within the purview of the federal courts. Our review is limited to whether the trial court abused its discretion in awarding alimony in futuro. See *id.* at 1107 (providing that “[t]he underlying obligation to provide support in the first place is necessarily determined by state law”).

The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives. While we will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn.Ct.App.2000).

The trial court determined that the Wife needed assistance in paying her medical expenses and found that the Husband had the ability to assist in paying those expenses. The trial court recognized that the \$288,000.00 award would sufficiently aid Wife in attending to her medical needs, but also recognized that, should the \$288,000.00 judgment be bankrupted, Wife *may* not have the funds needed for those expenses. In that situation, the trial court could modify its alimony *in futuro* award, if it deemed such relief was merited.

Although we understand the trial court’s motivation in awarding \$1.00 per month in alimony *in futuro* as a means of insuring its alimony *in solido* award against bankruptcy, such is not the purpose of alimony *in futuro*. As set out in the definition above, alimony *in futuro* is to be awarded when the court finds that rehabilitation is not feasible. Furthermore, alimony *in futuro* is not statutorily favored. See Tenn. Code Ann. § 36-5-121(d)(2). Based upon the trial court’s explanation of its reasoning in awarding the alimony *in futuro*, see *supra*, we conclude that the trial court abused its discretion in making this award. We reverse the award of alimony *in futuro*.

### Conclusion

For the foregoing reasons, we reverse the trial court’s award of alimony *in futuro*. The order of the trial court is otherwise affirmed. Costs of this appeal are assessed against the Appellant, Vincent Cardella, Jr. and his surety.

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J. STEVEN STAFFORD, J.